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10 UNITED STATES DISTRICT COURT
11 EASTERN DISTRICT OF WASHINGTON
12 AT SPOKANE

13 RACHEL ELSTON, and all others
14 similarly situated,

15 Plaintiffs,

16 v.

17 ENCORE CAPITAL GROUP, INC.,
18 MIDLAND FUNDING, LLC, MIDLAND
19 CREDIT MANAGEMENT, INC.,

20 Defendant.

Case No. 2:18-cv-00071-TOR

**DEFENDANTS' RESPONSE TO
PLAINTIFF'S MOTION FOR
SUMMARY JUDGMENT**

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22 SUMMARY JUDGMENT

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1 **I. INTRODUCTION**

2 In a misguided effort to distract the Court from the fact that the record clearly
3 reflects that Defendants’ are entitled to summary judgment on Plaintiff’s claims,
4 Plaintiff has lobbed in her own Motion for Summary Judgment (the “Motion”), which
5 is wholly inadequate and must be denied. To that end, while it is true that “when parties
6 submit cross motions for summary judgment, ‘[e]ach motion must be considered on its
7 own merits,” here, to the extent the Court grants Defendants’ Motion for Summary
8 Judgment, it must deny Plaintiff’s Motion.¹ Plaintiff’s Motion should be denied (and
9 summary judgment should be granted in favor of Defendants) for a number of reasons.
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¹ See *Fair Housing Council of Riverside County, Inc. v. Riverside Two*, 249 F.3d 1132,
15 1136 (9th Cir. 2001); *Boeing Co. v. Agricultural Ins. Co.*, Case No. C05-0921-JCC, 2008
16 WL 2945503, *6 n.3 (W.D. Wash. July 28, 2008) (determining that by granting
17 defendant’s motion for summary judgment, the district court must deny plaintiff’s
18 motion for summary judgment). Defendants’ Motion for Summary Judgment has been
19 fully briefed and is currently pending before this Court. See ECF No. 17. In this
20 Response, Defendants will cite to the pending factual record, including the Declaration
21 of John Nord (“Nord Decl.”) (ECF No. 28), in order to avoid burdening the Court with
22 duplicative declarations and exhibits.
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1 *First*, Plaintiff moves for summary judgment on claims not pled in her Complaint.
2 While Plaintiff's Complaint asserts an FDCPA claim based on a March 28, 2017 letter
3 attached as Exhibit A thereto (ECF No. 1 at 16), Plaintiff moves for summary judgment
4 here on ***an entirely different letter*** (dated May 3, 2017). *See* ECF No. 32 at 5-7; *see also*
5 Declaration of Rachel Elston in Support of the Motion at ¶ 33 ("Attached is a true and
6 correct copy of a letter that I received at the beginning of May, 2017 from Midland
7 Credit Management, Inc."). Ninth Circuit precedent makes clear that "where, as here,
8 the complaint does not include the necessary factual allegations to state a claim, raising
9 such a claim in a summary judgment motion is insufficient to present the claim to the
10 district court." *Navajo Nation v. U.S. Forest Service*, 535 F.3d 1058, 1080 (9th Cir.
11 2008). Given that Plaintiff's entire Motion is based on the May 3, 2017 letter and not
12 the letter pled in the Complaint, the Court should deny summary judgment on this basis
13 alone.
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15 *Second*, Plaintiff's Motion ignores the undisputed fact that Defendants' policies
16 completely negate any possibility that the statute of limitations on Plaintiff's account
17 could be revived. Tellingly, Plaintiff's Motion does not address this fundamental point
18 – a point which undercuts her entire case. But simply ignoring unfavorable facts does
19 not mean Plaintiff is entitled to summary judgment, or that Defendants' motion should
20 not be granted (in fact, it indicates exactly the opposite). Plaintiff further relies upon
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1 non-binding authorities that are distinguishable from the facts of this case and fails to
2 cite or consider more factually relevant and persuasive case law, which specifically
3 approves language identical to the language in the letter at issue here and rejects FDCPA
4 claims purportedly based upon such language.
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6 *Third*, Plaintiff’s Motion ignores Washington law which holds that partial
7 payment alone could not revive the statute of limitations on a time-barred account. *See*
8 *Jewell v. Long*, 74 Wn. App. 854, 857 (1994); *see also* RCW 4.16.280 (requiring any
9 acknowledgement renewing statute of limitation must be in writing signed by the party
10 to be charged). In short, the “risk” of reviving the statute of limitation that Plaintiff
11 complains of is not merely purely hypothetical and speculative (indeed, it is both)—it is
12 actually no risk at all, both as a matter of undisputed fact and as a matter of law. Indeed,
13 the Seventh Circuit just this week dismissed an FDCPA claim on Article III standing,
14 holding that where the defendant’s alleged procedural violation did not harm the
15 consumer, there could be no injury for a federal court to redress. *Casillas v. Madison*
16 *Avenue Associates, Inc.*, --- F.3d ---, 2019 WL 2353211, *1 (June 4, 2019). The same
17 result should apply here.
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22 *Finally*, Plaintiff’s Motion fails to point to any evidence to establish that either
23 Encore Capital Group, Inc. or Midland Funding LLC meet the statutory definition of
24 “debt collector,” for purposes of an FDCPA claim. Plaintiff’s claim must be dismissed
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as against these Defendants for this reason alone.

II. FACTUAL BACKGROUND

Plaintiff bases her FDCPA claim upon a letter that Defendant Midland Credit Management, Inc. (“MCM”) sent to Plaintiff. *See* ECF No. 1, Ex. A (March 28, 2017 letter from MCM to Plaintiff) (the “Letter”). The facts regarding the Letter are undisputed.² Specifically, there is no dispute that the Letter: (1) does not threaten

² Plaintiff has submitted a Statement of Uncontroverted Facts with her Motion (ECF No. 34), which improperly puts forward several erroneous legal conclusions and legal arguments as “facts,” and fails to cite the specific portion of the record where the “fact” is found as required by Local Rule 56. *See, e.g.*, Plaintiff’s Fact No. 4 (“This absolute protection against legal action afforded by Washington’s statute of limitations would be lost if Plaintiff made a partial payment or a promise to pay on the alleged debt”) (*Id.* at 2); Plaintiff’s Fact No. 6 (“Although the Defendants’ dunning letter urged the Plaintiff to make a payment on the time-barred debt, the Defendants avoided any disclosure that such a payment would eliminate the absolute protection afforded to Plaintiff by the statute of limitations and allow the Defendants, or its assignees, to sue her for the alleged debt.”). These purported “material” facts should be disregarded by the Court as it is well settled that “speculation, legal conclusions and conclusory allegations are not material

1 litigation; (2) does not use the term “settlement” or “settle”; and (3) gives the following
2 disclosure: “The law limits how long you can be sued on the debt and how long a debt
3 can appear on your credit report. Due to the age of this debt, we will not sue you for it
4 or report payment or non-payment of it to a credit bureau.” *See id.* It is also undisputed
5 that this disclosure language in the Letter follows *verbatim* the requirements of a
6 Consent Order that MCM and the CFPB entered into in 2015. *See Nord Decl.* (ECF
7 No. 28), at ¶ 13.

10 Next, Plaintiff’s Motion likewise does not contest the fact that Defendants have a
11 written policy providing that once the estimated statute of limitations has run on an
12 account, they will never file suit to collect such accounts, or otherwise treat the statute
13 of limitations as renewed, even if the debtor makes a partial payment. *See id.* at ¶¶ 8, 10.
14 Similarly, Defendants’ policies provide that they do not sell accounts to third parties.
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19 facts for purposes of summary judgment analysis.” *Jenkins v. Vail*, Case No. CV-08-
20 5075-CI, 2010 WL 3715154, *4 n.3 (E.D. Wa. Aug. 4, 2010) (citing *Anderson v. Liberty*
21 *Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). Defendants cite in this Response the portions
22 of the record establishing the facts that are truly undisputed, and will further address the
23 deficiencies with Plaintiff’s Statement of Uncontroverted Facts in its responding
24 statement pursuant to Local Rule 56.
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1 *See id.*, ¶ 7. Plaintiff's Motion points to no evidence suggesting that either of these
2 policies is not scrupulously followed both for her account and for any other accounts.

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4 Finally, Plaintiff's Motion relies upon a letter that she never pled in her Complaint.
5 The Complaint refers to and attaches the Letter, which is dated March 28, 2017 and
6 refers to an account originally issued by Chase Bank USA, N.A. with a charge-off
7 balance of \$1,853.38. *See* ECF No. 1, Ex. A. In her Motion and Declaration in Support
8 thereof, however, Plaintiff now – for the first time – describes a letter dated May 3, 2017,
9 which refers to an account originally issued by Citibank with a current balance of
10 \$5,522.00. *See, e.g.*, Motion at 5; see ECF No. 33 at ¶ 2 (“Attached is a true and correct
11 copy of the letter I received at the beginning of May, 2017 from Midland Credit
12 Management, Inc.”).

13 **III. LEGAL STANDARDS**

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15 Under Federal Rule of Civil Procedure 56, summary judgment shall be granted if
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17 “the movant shows that there is no genuine dispute as to any material fact and that the
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19 movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). Where cross-
20 motions for summary judgment are submitted on the same issue, a district court must
21 consider each motion on its own merits. *Fair Housing Council*, 249 F.3d 1132, 1136
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1 (9th Cir. 2001).³

2 **IV. ARGUMENT**

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4 Plaintiff's Motion raises matters not pled in her Complaint. Plaintiff also fails to
5 point to any evidence to show that Defendants made a false, deceptive, or misleading
6 representation, or otherwise committed any violation of 15 U.S.C. § 1692e. For all the
7 following reasons, the undisputed facts of this case establish that Plaintiff is not entitled
8 to judgment as a matter of law, and that the Motion must be denied.

9
10 **A. Summary Judgment is Not an Appropriate Vehicle to Correct Pleading**
11 **Deficiencies.**

12 Plaintiff's Motion attempts to rely on language from the May 3, 2017 letter, not
13 the March 28, 2017 Letter. This is wholly inappropriate for numerous reasons, not the
14 least of which is that the two letters *contain different language*. For example, only
15 included the May 3, 2017 letter (and not the March 28, 2017 letter at issue in the
16 complaint) contains the phrase "We can't change the past, but we can help with your
17 future". See Plaintiff's Motion at 6 (citing the differing language). Yet Plaintiff's
18 FDCPA claims are solely based on the March 28, 2017 letter, and her complaint contains
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23 ³ For the reasons set forth in Defendants' Motion for Summary Judgment (ECF No. 17),
24 Defendants have demonstrated that there is no genuine issue of material fact as it relates
25 to Plaintiff's claims and that they are entitled to judgment as a matter of law.
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1 no allegations whatsoever related to the May 3, 2017 letter, or the language in that letter.
2 See Compl. at ¶¶ 6.5 (ECF No. 1 at 9) (“On or about March 28, 2017, Defendant cause
3 [sic] to be delivered to Plaintiff a collection letter in an attempt to collect the alleged
4 debt.” See *Exhibit A.*); 6.8 (“The March 28, 2017 letter offered Plaintiff a number of
5 payment options”); 6.11 (“The March 28, 2017 letter states that, “The law limits
6 how long you can be sued on a debt. Because of the age of the debt, we will not sue you
7 for it.”)
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9
10 It is far past obvious that Plaintiff cannot move for summary judgment on matters
11 not raised in her Complaint (and that therefore have not been litigated, and are potentially
12 time barred under the FDCPA’s one-year statute of limitations). See, e.g., *Wasco Prods.,*
13 *Inc. v. Southwall Techs., Inc.*, 435 F.3d 989,992 (9th Cir. 2006) (holding that “summary
14 judgment is not a procedural second chance to flesh out inadequate pleadings.”); *Hasan*
15 *E. Washington State Univ.*, 485 Fed. Appx. 169, 171 (9th Cir. 2012) (holding that a claim
16 not pled in plaintiff’s complaint should be rejected at summary judgment stage); *Feezor*
17 *v. Patterson*, 896 F.Supp.2d 895, 903 (E.D. Cal. 2012) (“It is axiomatic that violations
18 not pled in the complaint cannot be considered by this court at the summary judgment
19 stage”). Accordingly, this Court cannot address the claims asserted in Plaintiff’s Motion
20 as they were not pled in Plaintiff’s Complaint.
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25 Even if the Court chooses to address the matters raised in Plaintiff’s Motion – it
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1 should not – Plaintiff’s Motion should still be denied (and Defendants’ motion granted).
2 Neither the May 3, 2017 letter nor the March 28, 2017 Letter contain any language that
3 could violate the FDCPA, and each expressly includes the same CFPB-approved
4 language explaining in layman’s terms the effect of the statute of limitations, and stating
5 without qualification that Plaintiff would not be sued in connection with the account.⁴
6 As explained in more fully below, Defendants are entitled to summary judgment no
7 matter which letter Plaintiff were to put forward as the putative basis for her claim.
8

10 **B. The Letter MCM Sent to Plaintiff Accurately Discloses the Nature of**
11 **the Account and is Not Misleading as a Matter of Law.**

12 The CFPB-approved language in the letter regarding the effect of the statute of
13 limitation is not misleading as a matter of law. Indeed, the language plainly discloses
14 both that the law limits the time in which a creditor can sue, and states that because of
15 the age of Plaintiff’s debt, she will not be sued. Federal courts around the country have
16 rejected FDCPA claims based on similar language.
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21 ⁴ For purposes of this Response, Defendants will generally refer to the March 28, 2017
22 Letter unless otherwise specified, as the March 28, 2017 Letter is the basis of Plaintiff’s
23 claim as pleaded in the Complaint, and it is inappropriate for Plaintiff to now raise new
24 arguments.
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1 For example, in *Olsen v. Cavalry Portfolio Servs., LLC*, Case No. 8:15-cv-25 20-
2 T-23AAS, 2016 WL 4248009 (M.D. Fla. Aug. 11, 2016), a creditor had sent letters to a
3 debtor stating in part, “The law limits how long you can be sued on a debt. Because of
4 the age of your debt, we will not sue you for it.” The *Olsen* court rejected the plaintiff’s
5 FDCPA claim, noting that the FDCPA imposed no duty on the defendant to advise the
6 plaintiff of potential defenses, including the expired limitation or consequences of
7 potential payment. *Id.* at *2 (citing *Ehrich v. Convergent Outsourcing, Inc.*, Case No.
8 15-cv-22796, 2015 WL 6470453 (S.D. Fla. Oct. 27, 2015)). The court further noted that
9 the letters specifically stated that the creditor “will not sue,” and that the letters at issue
10 adopted language recently approved by the Consumer Financial Protection Bureau. *Id.*
11 Other courts have reached similar results. *See Cooper v. Midland Credit Management,*
12 *Inc.*, Case No. 4:18-CV-82 (CDL), 2018 WL 6517448 (M.D. Ga. Dec. 11, 2018)
13 (upholding disclosure language identical to that used in the Letter in this case);
14 *Boedicker v. Midland Credit Management, Inc.*, 227 F. Supp. 3d 1235, 1241 n.5 (D. Kan.
15 2016) (rejecting FDCPA claim based on same disclosure language).

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21 **C. Plaintiff’s Motion Must be Denied Because It Fails to Rebut**
22 **Defendants’ Policy of Never Reviving Time-Barred Accounts, and**
23 **Erroneously Relies Upon Inapposite Authorities.**

24 Plaintiff’s Motion does not cite or address any of the authorities described above.
25 Nor does the Motion address the undisputed fact in the record that Defendants *never*
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1 revive the statute of limitations on an account once expired (*for any reason*, including
2 but not limited to the receipt of any payment). Instead, the Motion erroneously relies
3 solely on other non-binding authorities, which are inapposite because they are based on
4 different facts and law and did not involve or consider similar policies.
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6 First, the Motion relies most heavily upon *Pantoja v. Portfolio Recovery*
7 *Associates, LLC*, 852 F.3d 679 (7th Cir. 2017), citing and discussing it throughout. The
8 *Pantoja* court, however, did not confront key points that apply here—namely whether a
9 mere partial payment can “revive” a time-barred debt when state law does not allow
10 revival upon a mere partial payment, and that Defendants *never* revive the statute of
11 limitations for accounts that become time-barred. See *Koerner v. Midland Credit*
12 *Management, Inc.*, 347 F. Supp. 3d 1143, 1146 (M.D. Fla. 2018) (finding there is “no
13 scenario in which the statute of limitations would be revived and consequently, there is
14 nothing misleading about the collection letters”).
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18 *Pantoja* is also inapplicable on its own facts. In *Pantoja*, the Seventh Circuit
19 analyzed different language than the language at issue here, wherein the defendant
20 offered to “*settle* [an] account FOR GOOD,” and referred explicitly to specific
21 “*settlement* offers” being extended by the debt collector. *Pantoja*, 852 F.3d at 682
22 (emphases added). The letter at issue in *Pantoja* then went on to state only, “[b]ecause
23 of the age of your debt, we will not sue you for it and we will not report it to any credit
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1 reporting agency.” *Id.* Crucially, the *Pantoja* letter completely omitted the first (and
2 arguably most important) sentence in the disclosure, which explains in layman’s terms
3 how the statute of limitation works—“The law limits how long you can be sued on a
4 debt and how long a debt can appear on your credit report.” The *Pantoja* court
5 specifically noted and relied upon the fact that the debt collector in that case had not
6 used the full, two-part, CFPB-approved language, but that instead “[t]he carefully
7 crafted language, chosen to obscure from the debtor that the law prohibits the collector
8 from suing to collect this debt or even threatening to do so, is the sort of misleading
9 tactic the FDCPA prohibits.” *Id.* at 687.

13 Here, however, the entire CFPB-approved disclosure is included verbatim in
14 MCM’s Letter. With this full disclosure—no more and no less than required by the
15 CFPB—there is no risk that the consumer would misunderstand the import of the statute
16 of limitation, or believe that Defendants were reserving the right to sue. The approved
17 disclosure unequivocally provides that the statute of limitation has expired and for that
18 reason, Defendants will never sue. Accordingly, the reasoning and result in *Pantoja* only
19 reinforce Defendants’ position that the full disclosure, as used in the Letter in this case,
20 is not deceptive or misleading.

23 The additional out-of-circuit authorities cited in the Motion suffer from similar
24 deficiencies. In neither *Daugherty v. Convergent Outsourcing, Incorporated*, 836 F.3d
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1 507 (5th Cir. 2016) nor *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010 (7th Cir.
2 2014), did the court consider or address a policy of not reviving accounts based on partial
3 payments, making both cases inapplicable here. Moreover, in each case, the court's
4 ruling was expressly based on "settlement" or "settlement offers" extended by the debt
5 collector. *See Daugherty*, 836 F.3d at 513 ("... offering a 'settlement' and inviting
6 partial payment (without disclosing the possible pitfalls) could constitute a violation of
7 the FDCPA."); *McMahon*, 744 F.3d at 1021–22 (holding that "it is plausible that an
8 unsophisticated consumer would believe a letter that offers to 'settle' a debt implies that
9 the debt is legally enforceable"). Here, the Letter sent to Plaintiff does not mention
10 settlement, and the rationale and holding of these cases is accordingly inapplicable.
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14 Finally, in *Smothers v. Midland Credit Management, Inc.*, Case No. 16-2202-CM,
15 2016 WL 7485686 at *3 (D. Kan. Dec. 29, 2016), the Court based its holding on the
16 premise that the defendant could sell accounts to third parties. *Id.* ("And while defendant
17 may not sue, defendant can resell the debt to a collector who may.") Here, however,
18 there is uncontroverted evidence establishing that Defendants have an internal policy of
19 never re-selling accounts. *See* Declaration of John Nord, ECF No. 28 at 3, ¶ 7 (stating
20 that "Midland Funding and MCM have a policy of "not selling, transferring or conveying
21 accounts owned by Midland Funding to third parties."").
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25 For all these reasons, Plaintiff's Motion fails to cite any applicable authority to
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1 show that the language of the Letter at issue in this case could amount to an FDCPA
2 violation. Nor does the Motion offer any argument avoiding the fatal fact that Defendants
3 own written policy requires that they *never* revive time-barred accounts. The Motion
4 fails even to consider the more-applicable and factually relevant authorities around the
5 country specifically approving the precise language that is at issue here.
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8 Finally, the fact that Plaintiff cannot plead any actual harm establishes the case
9 must be dismissed for failure to plead standing under Article III. Just this week, the
10 Seventh Circuit dismissed an FDCPA claim on Article III standing, holding that where
11 the defendant's alleged procedural violation did not harm the consumer, there could be
12 no injury for a federal court to redress. *Casillas v. Madison Avenue Associates, Inc.*, ---
13 F.3d ---, 2019 WL 2353211, *1 (7th Cir. June 4, 2019).
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16 For these reasons, Plaintiff is not entitled to judgment as a matter of law, and her
17 Motion must be denied.

18 **D. Washington Law Required More Than Simply Partial Payment to**
19 **Revive the Statute of Limitation.**

20 In Washington, there “must be a clear and unequivocal intention on the part of the
21 obligor to revive the whole debt.” *J.M. Arthur & Co. v. Burke*, 83 Wn. 690, 698 (1915).
22 Reviving a statute of limitation once expired requires more than simply a partial
23 payment—it requires acknowledgement of the debt in writing, recognition of the
24 existence of the debt, communication to the creditor of the acknowledgement, and failure
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1 to indicate an intent not to pay the debt. *See Jewell v. Long*, 74 Wn. App. 854, 857
2 (1994); *see also* RCW 4.16.280 (any acknowledgement renewing statute of limitation
3 must be in writing signed by the party to be charged). Moreover, Washington law is clear
4 that “where a debt is acknowledged after the statute of limitations has run, the action
5 must be upon the new agreement and, in the nature of an original obligation, should be
6 strictly construed.” *In re Tragopan Properties, LLC*, 164 Wn. App. 268, 274 (2011).
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9 These longstanding principles of Washington law are fatal to Plaintiff’s FDCPA
10 claim, which is rooted wholly in the premise that an unsuspecting debtor might
11 inadvertently revive an otherwise-time barred debt simply by submitting a partial
12 payment. Whether or not that is true in other jurisdictions, Washington cases make clear
13 that more is required under Washington law. *See Jewell, supra*; *see also, e.g., Lombardo*
14 *v. Mottola*, 18 Wn. App. 227 (1977) (subsequent note executed by parties acknowledged
15 debt under promissory note.) Nor does the Motion cite *any* Washington case where a
16 partial payment alone was held to be a sufficient acknowledgement to revive the statute
17 of limitation after a debt became time-barred.
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21 Plaintiff’s contention that she or any Washington consumer would have been at
22 any risk if she had elected to make a partial payment accordingly flies in the face of
23 Washington law. While Plaintiff has the ability to voluntarily acknowledge the debt and
24 revive the statute of limitations through a new promise to pay, that can only happen if
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1 she clearly and unequivocally intends to do so. *See, e.g., J.M. Arthur*, 83 Wn. at 698;
2 *Tragopan*, 164 Wn. App. at 274. Plaintiff has made no such allegation in her Complaint
3 nor the Declaration she has submitted. Furthermore, the Motion fails to point to any
4 evidence indicating that Plaintiff made a payment on the account at issue, much less that
5 she “clearly and unequivocally” intended to make a new agreement. As such, Plaintiff’s
6 theory of liability in this case is entirely hypothetical. Accordingly, the disclosure
7 Plaintiff contends should have been made in this case would have been inaccurate (and
8 arguably misleading in itself) if it were to be included in Washington letters. *See*
9 *Koerner*, 347 F. Supp. 3d at 1146 (noting that “a statement that partial payment might
10 revive or reset the statute of limitations would be a misrepresentation . . .”).⁵
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16 ⁵ Courts in other jurisdictions have dismissed similar cases alleging that a partial
17 payment disclosure should have been included in states where revival is not possible
18 with a simple partial payment, and this Court should as well. *See, e.g., Kislin v.*
19 *Northalnd Grp., Inc.*, No. 16-4533, 2017 U.S. Dist. LEXIS 83197, at *7 (D.N.J. Apr. 19,
20 2017) (granting motion to dismiss because “under New Jersey law, the statute of
21 limitations would not have reset merely because the Plaintiff made a partial payment.
22 Thus, under the FDCPA, the Letter [which did not provide any disclosures regarding the
23 statute of limitations] was not deceptive or misleading in that regard.”); *Ali Judah v.*
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1 **E. Encore and Midland Funding are Not Debt Collectors.**

2 A defendant must be a “debt collector” to be subject to liability under the FDCPA.
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4 *See* 15 U.S.C. § 1692a(6). Plaintiff’s Motion contends that all Defendants are “debt
5 collectors,” but fails to point to any evidence to establish that Encore or Midland Funding
6 meet the narrow statutory definition, or otherwise to contravene the evidence in the
7 Court’s record that Encore and Midland Funding are not debt collectors. *See* Declaration
8 of John Nord, ECF No. 28 at 4–6 (stating that (i) Midland Funding is passive and does
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14 *Total Card, Inc.*, No. 16-5881, 2017 U.S. Dist. LEXIS 81738, at *9-10 (D.N.J. May 30,
15 2017) (granting motion to dismiss FDCPA lawsuit); *Genova v. Total Card, Inc.*, 193 F.
16 Supp. 3d 360, 368 (D.N.J. 2016) (“Defendant was not required to ‘inform the consumer
17 that the statute of limitations will reset upon making the first monthly payment,’ because,
18 under this Court’s reading of New Jersey law, that statement is incorrect . . .”); *Cohen v.*
19 *Ltd. Fin. Servs. LP*, 15-7422, 2016 U.S. Dist. LEXIS 91299, at *11 (D.N.J. Jul. 14, 2016)
20 (dismissing FDCPA lawsuit because in New Jersey, revival requires “an act of
21 declaration which establishes the debtor’s recognition of, and intention to pay, the *entire*
22 claim” and thus the partial payment sought in the letter would not have revived the statute
23 of limitations) (emphasis in original).
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1 not communicate with consumers, and (ii) Encore engages in no debt collection activity
2 and does not service accounts).

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4 The record in this case is already replete with citations to federal authority holding
5 that passive entities like Midland Funding, which purchases debt but is not involved in
6 the collection of that debt, do not qualify as “debt collectors” under 15 U.S.C. §
7 1692a(6). *See* Defendants’ Motion for Summary Judgment and Incorporated
8 Memorandum of Law (ECF No. 27) at 18–21;⁶ *see also* Declaration of John Nord (ECF
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12 ⁶ The authorities discussed include: *McAdory v. M.N.S. & Assoc., LLC*, Case No. 3:17-
13 cv-00777, 2017 WL 5071263, at *3 (D. Or. Nov. 3, 2017) (finding that “[d]ebt
14 purchasing companies like DNF who have no interactions with debtors and merely
15 contract with third parties to collect on the debts they have purchased simply do not have
16 the principal purpose of collecting debts”); *Gold v. Midland Credit Management, Inc.*,
17 82 F. Supp. 3d 1064, 1071 (N.D. Cal. 2015) (in the absence of “evidence showing a
18 purpose to collect on those debts” Midland Funding is not a debt collector under the
19 “principal purpose prong”); *Kasalo v. Trident Asset Management, LLC*, 53 F. Supp. 3d
20 1072, 1079 (N.D. Ill. 2014) (determining that a passive debt buyer was not a debt
21 collector under either prong of definition); *Dorrian v. LVNV Funding, LLC*, 479 Mass.
22 265 (Mass. 2018) (“... there is no evidence that Congress ever intended to include within
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1 No. 28) at ¶¶ 14–17. Encore is even further attenuated from the FDCPA’s definition of
2 debt collector. Encore has no interaction with consumers and does not engage in the
3 collection of debt. *See* Declaration of John Nord (ECF No. 28) at ¶ 20.
4

5 Plaintiff’s Motion fails to engage either with the facts in the record or the
6 overwhelming weight of authority demonstrating that Encore and Midland Funding are
7 not debt collectors. Instead, the Motion points solely to a statement from Encore’s
8 website regarding Encore’s services to customers in the debt recovery solutions space.
9 *See* Motion at 13. This statement is insufficient evidence to put Encore within the
10 statutory definition of “debt collector” under the FDCPA. Indeed, the statement makes
11 clear that Encore is “an international specialty finance company” that operates
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16 this definition debt buyers that own debts but use a third party to collect the debts and
17 therefore have no contact with the debtors.”); *Koerner*, 347 F. Supp. 3d at 1147 (because
18 Midland Funding is a debt buying company that only purchases and holds accounts, has
19 no employees and does not service accounts for others, “[t]here is no genuine dispute
20 that Midland Funding is not a debt collector within the meaning of the FDCPA.”);
21 *Henson v. Santander Consumer USA, Inc.*, 137 S.Ct. 1718 (2017) (holding that an entity
22 like Midland Funding, which only owns debts due to itself, is not a debt collector under
23 the second prong of the definition).
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1 “[t]hrough its subsidiaries” with respect to the purchase of financial assets and debt
2 servicing and other portfolio management services. *Id.* Nothing in this statement
3 acknowledges or admits that Encore or Midland Funding is a debt collector under the
4 FDCPA. *See Summers v. Midland Funding, LLC*, Case No. 14 CV 10174, 2017 WL
5 5152358, at *2 (N.D. Ill. Nov. 7, 2017) (determining that plaintiff failed to “submit
6 evidence that addresses whether each defendant meets one of the prongs of the statutory
7 definition” and rejecting argument that it is “obvious” defendants are debt collectors
8 without specific evidence to support conclusory allegation).

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Encore and Midland Funding are not debt collectors within the purview of the
FDCPA. *See Henson*, 137 S.Ct. at 1721–22 (“All that matters is whether the target of
the lawsuit regularly seeks to collect debts for its own account or does so for ‘another’”).
Because these Defendants are not debt collectors subject to the FDCPA, Plaintiff’s claim
against them fails as a matter of law, and her Motion must be denied as against these
Defendants for this reason alone.

20 V. CONCLUSION

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Plaintiff’s Motion should be denied. Defendants’ Motion for Summary Judgment
should be granted because there are no genuine issues of material facts and Defendants
are entitled to judgment as a matter of law.

1 Dated: June 7, 2019.

2 HOLLAND & KNIGHT LLP

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13 *Management, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that I caused the foregoing **RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT** to be served on the following person[s]:

Brian Cameron
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by the following indicated method or methods:

- ☒ by CM/ECF electronically mailed notice from the Court on the date set forth below.
- ☐ by mailing full, true and correct copies thereof in sealed, first class postage prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or attorneys, and deposited with the United States Postal Service at Portland, Oregon, on the date set forth below.
- ☐ by causing full, true, and correct copies thereof to be hand-delivered to the parties and/or their attorneys at their last-known office addresses listed above on the date set forth below.
- ☐ by sending full, true, and correct copies thereof, via overnight courier in sealed, prepaid envelopes, addressed to the parties and/or their attorneys as shown above, to the last-known office addresses of the parties and/or their attorneys, on the date set forth below.
- ☐ by faxing full, true, and correct copies thereof to the fax machines which are the last-known fax numbers for the parties' and/or attorneys' offices, on the date set forth below.

DATED June 7, 2019.

s/ David J. Elkanich
David J. Elkanich